

# It's Getting *Hot in Herre*:<sup>†</sup> California Senate Bill 1368 and the Dormant Commerce Clause

ANDREW F. ADAMS\*

## TABLE OF CONTENTS

|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION .....  | 288 |
| II.  | THE DORMANT COMMERCE CLAUSE .....   | 292 |
|      | A. <i>Testing for Violations of the Dormant</i><br><i>Commerce Clause</i> .....     | 293 |
|      | B. <i>Current State of the Court on the Dormant</i><br><i>Commerce Clause</i> ..... | 298 |
| III. | DORMANT COMMERCE CLAUSE'S APPLICATION<br>TO S.B. 1368 .....                         | 301 |
|      | A. <i>An Effect, but Discriminatory?</i> .....                                      | 302 |
|      | B. <i>In the Balancing Test</i> .....   | 303 |
|      | 1. <i>Best Available Option</i> .....   | 304 |
|      | 2. <i>Legitimate Local Purpose</i> .....  | 305 |
|      | 3. <i>Rationally Related</i> .....  | 307 |
|      | 4. <i>Extraterritoriality</i> .....   | 307 |
|      | C. <i>The Market Participant Doctrine</i> .....                                     | 308 |
| IV.  | PREDICTIONS AND POLICY RECOMMENDATIONS FOR<br>CLIMATE LEGISLATION .....             | 311 |
|      | A. <i>Potential Challenges</i> .....  | 311 |
|      | B. <i>Cooperative Federalism</i> .....  | 312 |
| V.   | CONCLUSION .....  | 314 |

---

<sup>†</sup> NELLY, *Hot in Herre*, on NELLYVILLE (Universal Records 2002).

\* J.D. candidate, University of San Diego School of Law, expected graduation May 2010; B.S. University of California at Berkeley. Thank you to my family for their support and the JCEL board members for their comments and edits.

Does California's Senate Bill 1368, which requires all long-term utility contracts with power generators to meet a greenhouse gas emission standard, violate the dormant Commerce Clause? The law will affect the interstate trade of electric power, but will that effect allow a constitutional challenge to S.B. 1368 and others like it to succeed? What are the arguments that will be made in a potential challenge, and what would be the likely ruling?

## I. INTRODUCTION

Recent proposals to limit greenhouse gases (GHGs) on the federal level, including cap-and-trade systems, have failed.<sup>1</sup> The Lieberman-Warner bill<sup>2</sup> was the most likely to succeed but failed to make it to a Senate floor vote in June 2008.<sup>3</sup> While this failure may have reflected poorly on the chances of passing federal climate-change legislation, most commentators see it as a sign that Congress will send a bill with more stringent requirements to the President before the end of 2009.<sup>4</sup> As of this writing, the U.S. House of Representatives had passed a climate-change bill with a stringent matching bill working its way through the Senate.<sup>5</sup> Commentators have questioned whether the current bill could be passed before the 2010 Copenhagen summit on climate change, a feat that would be important for those urging the United States to lead the way on international climate policy.<sup>6</sup> However, the shape of such a climate bill is uncertain and likely to undergo multiple

---

1. Zachary Coile, *Climate Bill's Defeat Sets Stage for Tough Round 2*, S.F. CHRON., June 7, 2008, at A2; See Haik Gugarats, *U.S. House Greenhouse Bill Even Tougher Than Lieberman-Warner*, GAS PROCESSORS REP., June 11, 2008, available at 2008 WLNR 11486328; Margot Roosevelt, *Trying to Reset Climate Clock*, L.A. TIMES, Oct. 16, 2008, at B1.

2. Lieberman-Warner Climate Security Act of 2007, S. 2191, 110th Cong. (2008). For a brief discussion of the bill, see *infra* note 173.

3. David M. Herszenhorn, *After Verbal Fire, Senate Effectively Kills Climate Change Bill*, N.Y. TIMES, June 7, 2008, available at <http://www.nytimes.com/2008/06/07/washington/07climate.html>; Gugarats, *supra* note 1.

4. John Broder, *Senate Opens Debate on Politically Risky Bill Addressing Global Warming*, N.Y. TIMES, June 3, 2008, at A16; Herszenhorn, *supra* note 3; Gugarats, *supra* note 1.

5. Louis Charbonneau & Gerard Wynn, *Obama's Climate-Change Hopes Get a Boost*, REUTERS, Oct. 12, 2009, <http://www.reuters.com/article/environmentNews/idUSN1252318120091012?feedType=RSS&feedName=environmentNews>.

6. *Id.*; see Jim Tankersley, *Obama Moves Forward with Plan to Cut Emissions*, L.A. TIMES, Jan. 25, 2009, at A11, available at <http://articles.latimes.com/2009/jan/25/nation/na-climate-econ25> (discussing that a cap-and-trade bill was passed in the House and is estimated to make it to the Senate for discussion in late 2009).

reforms before the end of 2009.<sup>7</sup> One of the most important features of the bill will be the role of states in limiting GHGs.

Nearly all stakeholders in the debate prefer federal action on GHG emissions. Environmental and public interest groups desire as large of a cut in GHG emissions as possible and see federal legislation as the only appropriate means to lower U.S. emissions as a whole.<sup>8</sup> The scientific community agrees, claiming that because climate change acts on a global scale, any state is far too small of a contributor to make a perceptible impact on its own.<sup>9</sup> Business groups have largely accepted regulation as inevitable and are calling for clear, national standards rather than a patchwork of different regulations for each state.<sup>10</sup> In the absence of such federal legislation, California and other states have passed laws aimed at reducing statewide GHG emissions. While it is settled that the federal government can preempt states on this issue,<sup>11</sup> the question is whether the Constitution allows states to act on such an enormous problem in the federal government's absence.

California's Global Warming Solutions Act (A.B. 32)<sup>12</sup> grabbed many headlines in 2006 because of the GHG-reduction targets it established.<sup>13</sup> But for many in the electricity industry, 2006's Greenhouse Gas Emissions Performance Standard (S.B. 1368)<sup>14</sup> was actually the more

7. Nathaniel Gronewold, *Sen. Boxer Says Obama Admin Could Make Climate Pledge in Copenhagen*, N.Y. TIMES, Oct. 12, 2009, available at <http://www.nytimes.com/gwire/2009/10/12/12greenwire-sen-boxer-says-obama-admin-could-make-climate-39754.html>.

8. RICK DUKE & DAN LASHOF, *THE NEW ENERGY ECONOMY: PUTTING AMERICA ON THE PATH TO SOLVING GLOBAL WARMING* 8 (2008), <http://nrdc.org/globalWarming/energy/eeconomy.pdf> (arguing that federal government must act to have an impact on global warming).

9. Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39, 67-73 (2007).

10. DUKE & LASHOF, *supra* note 8, at 10 ("Twenty-seven major U.S. corporations—including industry giants such as General Electric, General Motors, DuPont, AIG, Caterpillar, and Shell—have joined the NRDC and other nonprofit organizations to form the U.S. Climate Action Partnership (USCAP) to advocate for federal legislation to cut emissions by 60 to 80 percent by 2050.").

11. See The Supremacy Clause, U.S. CONST. art. VI, cl. 2.

12. California Global Warming Solutions Act, Assemb. 32, 2005-2006 (Cal. 2006).

13. Mark Martin, *A Global Warming Moment*, S.F. CHRONICLE, Sept. 28, 2006, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/09/28/WARMING.TMP>; Josh Richman, *Governor Signs Historic Bill to Reduce Greenhouse Gases*, OAKLAND TRIB., Sept. 28, 2006, available at [http://findarticles.com/p/articles/mi\\_qn4176/is\\_20060928/ai\\_n16765531/?tag=content;coll](http://findarticles.com/p/articles/mi_qn4176/is_20060928/ai_n16765531/?tag=content;coll).

14. CAL. PUB. UTIL. CODE §§ 8340-41 (West 2009).

significant piece of legislation.<sup>15</sup> S.B. 1368 prevents all California utilities, both privately and publicly owned, from signing long-term contracts with a power plant that produces more greenhouse gases per unit of power than the prevailing natural-gas standard—set at 1,100 pounds of carbon dioxide per megawatt hour.<sup>16</sup> California’s climate action closely follows the timeline and standards established by the Kyoto Protocol,<sup>17</sup> leading some to argue that California’s legislation was the State’s way of indirectly “signing” the treaty, despite the legal restraints that would otherwise prohibit such an action.<sup>18</sup>

One major hurdle for California legislators in drafting A.B. 32 and S.B. 1368 was striking a realistic balance between GHG reduction and effective enforcement.<sup>19</sup> S.B. 1368’s stated goal was to demonstrate leadership regarding the “sustainability of our planet.”<sup>20</sup> Legislators and commentators work under the general assumption that strict regulations on in-state carbon emissions will lead industries to relocate to nearby states, where loose or non-existent carbon rules allow for cheaper energy production.<sup>21</sup> Legislators did not want to act in a way that would hurt

---

15. Rich Saskal, *California Public Utilities Feeling the Effects of Greenhouse Gas Bill*, 258 BOND BUYER 34, Dec. 22, 2006; Lyn Corum, *Governor Schwarzenegger Signs Legislation that Will Limit Coal-Fired Imports into California*, GLOBAL POWER REP., Oct. 5, 2006, at 23; John Myers, *The Other Greenhouse Gas Bill...*, CAPITAL NOTES, Sept. 27, 2006, <http://blogs.kqed.org/capitalnotes/2006/09/27/the-other-greenhouse-gas-bill-2/>.

16. CAL. PUB. UTIL. CODE § 8341(b)(1)-(d)(2). The Greenhouse Gases Emission Standard requires the PUC to set the performance standard at “no higher than the rate of emissions of greenhouse gases for combined-cycle natural gas baseload generation.” CAL. PUBL. UTIL. COMM’N, PUC SETS GHG EMISSIONS PERFORMANCE STANDARD TO HELP MITIGATE CLIMATE CHANGE, Jan. 25, 2007, [http://docs.cpuc.ca.gov/published/News\\_release/63997.htm](http://docs.cpuc.ca.gov/published/News_release/63997.htm); see CAL. PUB. UTIL. CODE § 8341(d)(1). Notably, this standard only would restrict coal-fired power plants.

17. The California standards called for larger cuts than the original Kyoto Protocol. See U.K. and California: *Environmental Pals*, Blair and Schwarzenegger to Consider Methods to Reduce Greenhouse Gases, INT’L HERALD TRIB., Aug. 1, 2006, at 10 [hereinafter *Environmental Pals*].

18. Margot Roosevelt, *California Offers to Lead on Climate Change Fight*, L.A. TIMES, Nov. 20, 2008, at A22; Samantha Young, *Schwarzenegger Opens Climate Summit with Obama*, ASSOCIATED PRESS, Nov. 19, 2008. States cannot sign international treaties, as it would violate the foreign affairs power. U.S. CONST. art. II, § 2, cl. 2.

19. CAL. PUB. UTIL. CODE § 8341(b)(1)-(d)(2); CAL. PUBL. UTIL. COMM’N, PUC SETS GHG EMISSIONS PERFORMANCE STANDARD TO HELP MITIGATE CLIMATE CHANGE, Jan. 25, 2007, [http://docs.cpuc.ca.gov/published/News\\_release/63997.htm](http://docs.cpuc.ca.gov/published/News_release/63997.htm); *Environmental Pals*, supra note 17.

20. Judy Lin, *Some Legislators Thinking Green: Democrats Pushing Bills, Opposed by Business, on Water and Air Quality*, SACRAMENTO BEE, July 2, 2006 (quoting then-Assembly Speaker Fabian Nunez, D-Los Angeles).

21. This phenomenon is generally referred to as “race to the bottom.” For a discussion of the novelty of California’s “bottom-up” regulation of an issue that at most requires a “top-down” solution, see Kaswan, supra note 9, at 62-64; Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments*

the State economically, especially if they only shuffled around certain power contracts without a net drop in GHG emissions.<sup>22</sup> This concept is referred to as “leakage,” meaning that to the extent that carbon emissions in California are reduced, those reductions would move or “leak” into other states that have little or no GHG regulations.<sup>23</sup> This would even out any in-state reductions to a large-scale net reduction of zero.

To reduce leakage, California legislators aimed to regulate the power that the state consumes, not just what it produces in-state. Currently 18.2% of electricity consumed in California comes from coal.<sup>24</sup> However, over 90% of California’s coal-fired power is imported from other states, which makes regulating coal emissions problematic.<sup>25</sup> Because of this system, for California to lessen the amount of emissions, it must change the type of power its utilities buy from out-of-state generators, which creates a potential dormant Commerce Clause challenge. For S.B. 1368 to withstand scrutiny, California will have to show that the law is not facially discriminatory, the goal is legitimate, there is no easier or localized solution, and the value of S.B. 1368 outweighs the burdens it places on the interstate power market.

This Article addresses whether S.B. 1368 could hold up to a Commerce Clause challenge in three stages. Part II discusses the dormant Commerce Clause and how it is applied to state laws that potentially affect interstate commerce. It explains the history and development of the concept and fleshes out the two-step test that exists today: (1) courts determine whether a law is facially discriminatory; (2) if not, courts apply a test that weighs the respective burdens and benefits of the law.

---

*to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1020-22 (2006).

22. Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1670-71 (2008).

23. For a full discussion of free-riding—non-regulating states benefiting from GHG reductions in regulated states—and leakage, see Cary Coglianese & Jocelyn D’Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411, 1419-20 (2008); Joseph Allan MacDougald, *Why Climate Law Must Be Federal: The Clash Between Commerce Clause Jurisprudence and State Greenhouse Gas Trading Systems*, 40 CONN. L. REV. 1431, 1437, 1446-47 (2008); Benjamin Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENVTL. L.J. 397, 465-68 (2008).

24. MICHAEL NYBERG ET AL., CAL. ENERGY COMM’N, 2008 NET SYSTEM POWER REPORT 5 (2009), <http://www.energy.ca.gov/2009publications/CEC-200-2009-010/CEC-200-2009-010-CMF.PDF>.

25. *Id.*

Part II also discusses the different ways in which many of the current Supreme Court Justices interpret and apply the dormant Commerce Clause. Part III applies the current interpretations and tests of the dormant Commerce Clause to S.B. 1368. Part IV addresses some of the policy considerations involved in the federal and state intersection. States should be allowed to impose their own climate-change laws and to set their own caps, following the model of cooperative federalism. This Article concludes by noting that while legislation like S.B. 1368 may not be the best solution to global warming, in the absence of federal legislation, it amounts to legitimate state action. Further, S.B. 1368 serves as a role model that will hopefully inspire a cooperative federalism model.

## II. THE DORMANT COMMERCE CLAUSE

The dormant Commerce Clause is based on an interpretation of Article I, section 8 of the Constitution, which grants Congress the ability to legislate on interstate commerce.<sup>26</sup> While the Commerce Clause clearly states that only the federal government can regulate interstate trade, courts have understood a “negative” or “dormant” aspect to this restraint.<sup>27</sup> This suggests that even without federal action, states have no right to legislate in areas that affect interstate commerce.<sup>28</sup> The federal government’s singular power to affect interstate trade came as a result of the economic Balkanization and retaliatory state tariffs in the United States under the Articles of Confederation.<sup>29</sup> The framers wanted to show that the United States’ “economic unit is the Nation, which alone has the gamut of powers necessary to control the economy.”<sup>30</sup> Courts have carved a major exception to this rule—the market participant doctrine, which excludes all state action from the dormant Commerce Clause when the state is acting in the market as a participant and not a regulator.<sup>31</sup>

---

26. U.S. CONST. art. I, § 8, cl. 3.

27. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 98 (1994).

28. *Id.*

29. *Hughes v. Oklahoma*, 441 U.S. 322, 325-36 (1979).

30. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537 (1949); *see also Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (“The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”); THE FEDERALIST No. 22 (Alexander Hamilton) (describing how the Constitution was meant to prevent local protectionism as a form of retaliation).

31. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803, 809-10 (1976); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588-89 (1997); *White v. Mass. Council of Const. Employers, Inc.*, 460 U.S. 204, 206-08 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980).

The test used to identify a dormant Commerce Clause violation has undergone significant change over its lifetime. Scholars, judges, and commentators have argued for a one-,<sup>32</sup> two-,<sup>33</sup> and three-tiered<sup>34</sup> tests. Courts generally now apply a two-tiered test and take many relevant factors into the second tier.<sup>35</sup> First, a court must decide whether a law is facially discriminatory, evidenced by a different standard for in- and out-of-state businesses “that benefits the former and burdens the latter.”<sup>36</sup> Then if the law is found to be facially discriminatory, it is subjected to strict scrutiny,<sup>37</sup> under which a court looks for extraordinary reasons for the local regulation.<sup>38</sup> Strict scrutiny is as tough as it sounds, and is sometimes referred to as the “per se” test because, for all practical purposes, the law becomes per se invalid if it is found to be facially discriminatory.<sup>39</sup> If the regulation at issue is not invalidated by the first part of the test, the court asks a second question, which is whether the law serves a legitimate local purpose and is applied in a rational manner; then the court must rule based on whether the regulation places an “undue burden” on commerce.<sup>40</sup>

#### *A. Testing for Violations of the Dormant Commerce Clause*

Under part one of the dormant Commerce Clause test, laws that are facially discriminatory towards out-of-state interests are struck down. If

---

32. Justices Scalia looks only for facial discrimination, discussed *infra* Part I(a).

33. This is referred to as the *Pike* test, which looks for facial discrimination, then if none is found, weighs the respective interests. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

34. This test is different from the *Pike* test in that it removes the test for alternative methods, legitimate purpose, or rational relationship from the *Pike* test and examines the factor on its own.

35. See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 345, 347 (2007); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994). While both cases rest heavily on a public/private distinction, they also support a two-tiered test.

36. Or. *Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994); see also Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 894 (2008).

37. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

38. See *United Haulers*, 550 U.S. at 353-54.

39. David S. Day, *The Expanded Concept of Facial Discrimination in the Dormant Commerce Clause Doctrine*, 40 CREIGHTON L. REV. 497, 498 n.3 (2007) (noting only one discriminatory law has passed this test).

40. *Carbone*, 511 U.S. at 390; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

the legislative intent is to put out-of-state interests at a disadvantage, even to a small extent,<sup>41</sup> the law cannot pass strict scrutiny.<sup>42</sup> For instance, regulations barring milk depots from shipping out-of-state,<sup>43</sup> controlling the exportation of minnows,<sup>44</sup> and keeping packaging or any type of processing in-state,<sup>45</sup> have all been struck down as facially discriminatory because their drafters' intention was to put out-of-state interests at a disadvantage solely because of their location. If the intent of the law was not to discriminate against out-of-state interests, it is put to the balancing test developed in *Pike*.<sup>46</sup> In this test, the burden on interstate commerce imposed by the regulation is weighed against the state interest in regulation; if the benefit to the state is weak or the impact on trade strong, the regulation is usually struck down.<sup>47</sup> The *Pike* Court put forth the following statement of the law: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>48</sup> In weighing the burden and benefits in the second part of the *Pike* test, courts examine many aspects of the law in question.

The "burden" is given weight by first looking to see if there are alternatives that would accomplish the state goal without imposing on

---

41. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269-70, 276 (1988) ("Where discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."); *Pike*, 397 U.S. at 142; Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1117-18 (2008) (discussing the development of the "undue burden" test from the "barriers to trade" test).

42. Only one law has passed the test. See *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (ruling a law banning baitfish from out-of-state, while discriminatory, was still valid because of the threat posed to the environment by the fish).

43. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 544-545 (1949).

44. *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979). *Contra Taylor*, 447 U.S. 131 (law banning baitfish). The threat that the out-of-state fish posed to survival of the local fish was the difference in these cases.

45. *E.g.*, *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 84 (1984) (timber); *Pike*, 397 U.S. at 139, 142 (melons).

46. *Pike*, 397 U.S. at 142. This test has roots in *Southern Pacific v. Arizona*, 325 U.S. 761, 779-80 (1945) (striking an Arizona requirement that cantaloupes grown in-state had to be packaged before transported out-of-state).

47. *Pike*, 397 U.S. at 142 ("[T]he question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved . . ."); see also *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) ("The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that *description in connection with the State's regulation of interstate commerce*.").

48. *Pike*, 397 U.S. at 142 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).



interstate commerce.<sup>49</sup> If it can be shown that there is a cheaper and easier way to remedy the target problem without burdening interstate commerce, courts will give the law very little deference when applying the *Pike* test.<sup>50</sup> For example, in *Minnesota v. Clover Leaf Creamery Co.*, Minnesota was allowed to ban all plastic milk cartons because they caused problems in landfills, wasted energy, and generally “deplete[d] natural resources.”<sup>51</sup> The Court could not find an “approach with ‘a lesser impact on interstate activities’” that would have accomplished Minnesota’s valid goal of protecting natural resources, so it applied the *Pike* test.<sup>52</sup>

In conceptualizing the burden on interstate commerce, courts also examine who the burden falls upon. In *Clover Leaf*, most Minnesota milk carton producers used paperboard, not plastic, so they would not be burdened by the law.<sup>53</sup> Therefore, the burden would fall on out-of-state plastic carton producers, which would normally arouse suspicion that the law was facially discriminatory. However, the Court found that the alleged burden on out-of-state milk carton producers was “exaggerated”<sup>54</sup> because the account of paper cartons could have come from out-of-state, and some of the plastic carton manufacturers were in Minnesota.<sup>55</sup> Similarly, in *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, the Court found that the burden of a waste-

---

49. See *id.* (“And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 375-77 (1976) (finding that where local inspections could serve purpose of ensuring that local health standards were met, statute permitting sale of out-of-state milk in Mississippi only if the state of origin allowed sale therein of Mississippi milk on a reciprocal basis impermissibly burdened commerce); see also *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-55 (1951) (ruling that a regulation protecting the safety of milk was deemed invalid because there were much better options available to meet said goal).

50. See *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 353-54 (1977) (finding that North Carolina could have easily used other methods to provide consumers with certification of apples).

51. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-74 (1981) (“Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is ‘clearly excessive in relation to the putative local benefits.’”) (quoting *Pike*, 397 U.S. at 142).

52. *Id.* (citing *Pike*, 397 U.S. at 142).

53. *Id.*

54. *Id.* (citing the inference that some of the replacements for plastic jugs would come from out-of-state wood, and that plastic would continue to be used, just in different products).

55. *Id.*

processing requirement would be carried by the very citizens that voted for it, which was evidence that the citizens had judged for themselves that the benefit was worth the burden.<sup>56</sup>

The counterbalance to the harm that the burden causes in the *Pike* test is the benefit the in-state interests receive from a regulation. In order to give appropriate significance to the benefit, a court looks to whether the goal of the regulation is a “legitimate local interest.”<sup>57</sup> The *Clover Leaf* Court ruled that Minnesota had a “substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems”—a goal strong enough to justify the regulatory scheme.<sup>58</sup> Because the Minnesota legislature did not enact the ban to give an advantage to in-state producers, and since the benefit of less plastic in landfills was strong, the law was upheld.<sup>59</sup>

Another factor determining the benefit in the *Pike* test is whether the law is “rationally related” to its stated goal. This test exists to prevent states from passing discriminatory legislation disguised as environmental or health regulations.<sup>60</sup> The Supreme Court has made it clear that there is a thin line between discriminatory intent and discriminatory effect, and barring clear evidence of discriminatory intent, it would largely defer to legislatures.<sup>61</sup> The Court did find discriminatory intent in *Hunt v. Washington State Apple Advertising Commission* (*Washington Apple*), where North Carolina’s apple licensing scheme was created to protect in-state apple growers because the apples it was trying to keep out were subject to more stringent testing.<sup>62</sup> If health was North Carolina’s concern, its less stringent requirements were not “rationally related to their supposed purpose of maintaining apple standards” because

---

56. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007).

57. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392-94 (1994) (ruling that a flow control ordinance meant to finance a waste processor was not within the bounds of a “legitimate local interest”).

58. *Clover Leaf*, 449 U.S. at 473.

59. *Id.* at 471-74.

60. *Carbone*, 511 U.S. at 393 (stating that there are alternate means to reach the stated health goal of the garbage flow regulation). A stream of analysis takes place in judging whether the regulation is the least restrictive option. Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 57-59 (2003).

61. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 276 (1988) (stating that the effects did not need to weigh heavily on out-of-state interests, that discrimination was enough); *City of Phila. v. New Jersey*, 437 U.S. 617, 626-27 (1978) (stating that protectionism is difficult to determine, and in that case, the facially discriminatory purpose was clear); *Walgreen Co. v. Rullan*, 405 F.3d 50, 56 (1st Cir. 2005) (finding a dormant Commerce Clause violation, but only because the law was *de jure* and *de facto* protectionism).

62. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352-54 (1977).

Washington's standards were at least as strong.<sup>63</sup> The Court noted that the effect of the regulation, and most likely its goal, was to protect the North Carolina market for local apples.<sup>64</sup> There was no benefit; thus any burden at all that the regulation would have on interstate commerce would fail the *Pike* test.<sup>65</sup>

Another aspect of the *Pike* test is referred to as "extraterritoriality," meaning that a state's regulation controls activities that occur entirely in other states.<sup>66</sup> In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, the Court struck down a New York law requiring all liquor sellers to keep their prices in New York at or below the price they charged anywhere else in the nation.<sup>67</sup> While the law regulated liquor prices in-state, it set that price based on the lowest price in neighboring states, which effectively regulated liquor prices for the region, not just New York.<sup>68</sup> The Court examined the state law's impacts and found that it would result in companies being barred from raising prices anywhere in the country above what New York had listed; this impermissibly impacted interstate commerce.<sup>69</sup> The goal of securing cheaper prices for New York residents was not important enough to justify the regulation, so the law failed the *Pike* test.<sup>70</sup> *Brown-Forman*, in conjunction with the *Pike* analysis, illustrates that states cannot attempt to control commerce in an action that takes place entirely outside of its borders.<sup>71</sup>

In applying this *Pike* test, the Court must weigh the costs and benefits of regulations while examining their motives and methods. If a law is not facially discriminatory, courts must examine the law's relationship to its purpose and any extraterritorial impacts. Historically, the Court examines the intent of environmental laws intensely and has invalidated

---

63. *Id.*

64. *Id.* The Court found that the "open space" concerns brought in a dairy-pricing case were not appropriate environmental concerns and were completely incidental to the legislative action. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 204-05 n.20 (1994).

65. *Washington Apple*, 432 U.S. at 352-54. The Court also seemed to be particularly galled by the fact that the law itself came from the state apple lobby. *Id.*

66. *Healy v. Beer Inst.*, 491 U.S. 324, 332-33 (1989); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1522-23 (2007).

67. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 577, 583-84 (1986).

68. *Id.*

69. *Id.* at 581-84.

70. This reasoning was followed in *Healy*, 491 U.S. at 332-33.

71. *Id.*; *Brown-Forman*, 476 U.S. at 581-84.

environmental restrictions on materials coming both in<sup>72</sup> and out<sup>73</sup> of states. To withstand scrutiny, natural resource regulations have to be appropriately targeted, with statements elucidating their rationales and intentions to regulate within a state's borders, for a court to rule that any effect on interstate commerce is constitutionally permissible.<sup>74</sup>

### B. Current State of the Court on the Dormant Commerce Clause

The current and future Supreme Court's application of the dormant Commerce Clause is uncertain,<sup>75</sup> especially because the analysis requires "eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects."<sup>76</sup> Two Supreme Court Justices have clearly stated their rejection of the *Pike* test, and one of them would only strike down state laws that are facially discriminatory.<sup>77</sup> Other members of the Court are split on the application. The most important aspects of any dormant Commerce Clause question in the current Supreme Court is whether the law at issue amounts to facial discrimination and what value will be ascribed to the law under the *Pike* test.<sup>78</sup>

Justices Scalia and Thomas will not likely strike down any non-discriminatory state regulation that has an impact on interstate commerce. They believe that the interplay between state and federal regulations should be decided by the respective legislatures.<sup>79</sup> Absent *stare decisis* concerns, Justice Scalia would invalidate state laws only when they are clearly facially discriminatory,<sup>80</sup> while Justice Thomas believes that

---

72. *City of Phila. v. New Jersey*, 437 U.S. 617, 627 (1978) (finding that barring incoming trash is a violation of the dormant Commerce Clause).

73. *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979) (finding that barring taking minnows is a violation of the dormant Commerce Clause).

74. Edwin Chemerinsky et al., *California, Climate Change and the Constitution*, 37 ENVTL L. REV. 10,653, at 10,659 (stating that California strengthens its claim to a strong state interest in GHG regulation as long as it "compiles a record documenting the effectiveness of its regulatory measures in accomplishing the state's legitimate objectives").

75. *Id.* at 10657 (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610-12 (1997) (Thomas, J., joined by Rehnquist, C.J. & Scalia, J., dissenting) (calling the application of the dormant Commerce Clause a "tangled underbrush" and "virtually unworkable in practice")).

76. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

77. See *supra* notes 79-81 and accompanying text.

78. Nathan E. Endrud, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV. J. ON LEGIS. 259, 266 (2008).

79. Kenneth Starr, *The Roberts Court and the Business Cases*, 35 PEPP. L. REV. 541, 544-45 (2008) (stating that in the absence of federal legislation on the issue, states have the right to act).

80. See *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1821 (2008) (Scalia, J., concurring in part) (stating that legislators, not judges, are better at weighing the respective burdens and benefits of legislation); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste*

states have a full right to regulate in matters of interstate commerce, reading a more literal interpretation that the Commerce Clause has no “dormant” effect.<sup>81</sup> Justice Thomas has expressed his view that all state regulations that affect interstate trade are valid until superseded by the federal government.<sup>82</sup> Scholars observe that Justice Scalia’s and Justice Thomas’s positions have influenced the Court because recent dormant Commerce Clause cases have been limited to facially discriminatory regulations, and some of the other Justices simply attempt to avoid confrontation with Justices Scalia and Thomas on whether non-discriminatory laws need to undergo the *Pike* balancing test at all.<sup>83</sup>

Justice Breyer also tends to grant greater deference to state regulations that affect interstate commerce, looking primarily at costs and benefits rather than intent. He would likely allow state legislation, absent clear evidence that a regulation heavily burdens out-of-state interests or protects in-state interests, for the benefit of the free market.<sup>84</sup> Similarly, Chief Justice Roberts gives leeway to states in their regulation of goods and services that might have an interstate impact, as long as clear discrimination is not the impetus for the regulation.<sup>85</sup> He went so far as to state that the “dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government[s] to undertake[] and what activities must be the province of private market competition,”<sup>86</sup> evidencing a persuasion to permit state

---

Mgmt. Auth., 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., dissenting) (stating that the *Pike* test “is ill suited to the judicial function and should be undertaken rarely if at all”); David S. Day, *The “Mature” Rehnquist Court and the Dormant Commerce Clause Doctrine: the Expanded Discrimination Tier*, 52 S.D. L. Rev. 1, 5-6 (2007).

81. *United Haulers*, 550 U.S. at 352 (Thomas, J., concurring in judgment) (“To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States’ power to regulate commerce. In the face of congressional silence, the States are free to set the balance between protectionism and the free market. Instead of accepting this constitutional reality, the Court’s negative Commerce Clause jurisprudence gives nine Justices of this Court the power to decide the appropriate balance.”).

82. *Id.* (“To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States’ power to regulate commerce.”) (Thomas, J., concurring in judgment).

83. Day, *supra* note 80, at 51.

84. *Id.* at 46 (comparing Justice Breyer’s decisions in *S.-Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) and *Am. Trucking Ass’n, Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433-36 (2005)).

85. See *United Haulers*, 550 U.S. at 340-47 (plurality); Kenneth L. Karst, *From Carbone to United Haulers: The Advocates’ Tales*, 2007 SUP. CT. REV. 237, 276-77.

86. *United Haulers*, 550 U.S. at 343.

regulations. In *United Haulers*, he further explained his views that state governments are given leeway to pursue “health, safety[,] and welfare” laws and that when those burdened are the ones that established the regulations, such regulations are acceptable.<sup>87</sup> However, based on his dissent in *Massachusetts v. EPA*, Chief Justice Roberts appears to hold a low opinion of environmental regulations<sup>88</sup>—particularly climate-change regulation,<sup>89</sup> so a dormant Commerce Clause challenge to a climate-change regulation might render Chief Justice Roberts conflicted.

Although Justice Ginsburg has not assigned herself to a particular point of view on the application of the dormant Commerce Clause to environmental regulations, she is often placed in the “liberal” camp that provides leeway for the federal government to act.<sup>90</sup> She has traditionally been lenient when the federal government passes a law for general health and safety reasons, affording the federal government broad deference to legislate.<sup>91</sup> Similarly, Justice Stevens is also somewhat unclear in his application.<sup>92</sup> He applies the *Pike* test but would grant deference to a state law if Congress, by its silence, has allowed it.<sup>93</sup> These Justices face Chief Justice Roberts’s challenge, only juxtaposed: they find environmental laws compelling, yet have reasoned so in a way that oftentimes supports federal action over states’ rights to act.

Justice Kennedy takes a hard line on the issue and would likely strike down a state action that has out-of-state effects. In this aspect, he is like Justice Breyer, but Justice Kennedy’s viewpoint was influenced by his desire to promote a national economy unfettered by individual state regulation.<sup>94</sup> Commentators have attributed this to a strict adherence to the Commerce Clause and a strong belief in “antiregulatory, procompetitive ideals,”<sup>95</sup> but such a view not without limit.<sup>96</sup> In *Carbone*, Justice Kennedy

---

87. *Id.* at 345.

88. This opinion was on display as recently as *United Haulers*, as Chief Justice Roberts did not join the rest of the plurality in extolling the virtues of recycling and that the state had full interest in increasing it. *Id.* at 1798. Interestingly, Justice Scalia did not join this aspect of the decision, but did concur with the larger decision allowing the regulation. *Id.* at 348. It can be assumed that dormant Commerce Clause challenges with regard to climate-change regulation would receive similar treatment.

89. *Massachusetts v. EPA*, 549 U.S. 497, 535-38 (2007) (Roberts, C.J., dissenting).

90. Karst, *supra* note 85, at 247.

91. *Id.*

92. *Id.* at 246.

93. Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 *FORDHAM L. REV.* 2133, 2149-51 (2006); Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 *MINN. L. REV.* 1764, 1787 (2004).

94. Karst, *supra* note 85, at 247.

95. See *Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1822 (2008) (Kennedy, J., dissenting); Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Doctrine*, 69 *U. CHI. L. REV.* 429, 470-71 (2002); Michael C. Blumm & Sherry L. Bosse, *Justice Kennedy and the Environment: Property, State’s Rights, and a*

wrote that the garbage flow control ordinance at issue was invalid because it attained its goal simply by “depriving competitors” of access to the market,<sup>97</sup> evidencing a belief that state regulations that complicate and burden trade are examined and tested by the dormant Commerce Clause.<sup>98</sup> In Justice Kennedy’s view, a law’s equal application to in-state and out-of-state operators does not grant the regulation a pass; rather, he examines the law’s real-world impact on interstate trade.<sup>99</sup> Justice Alito appears to agree, judging by his dissent in *United Haulers*, and he would set the bar high to deem state infringement on interstate commerce acceptable.<sup>100</sup>

### III. DORMANT COMMERCE CLAUSE’S APPLICATION TO S.B. 1368

Power generators and out-of-state electricity importers are considering bringing a lawsuit against California, claiming that S.B. 1368 violates the dormant Commerce Clause.<sup>101</sup> The suit is likely to come from Utah and Wyoming power generators, as they provide a large proportion of California’s out-of-state, coal-generated power.<sup>102</sup> Anticipating such a

---

*Persistent Search for Nexus*, 82 WASH. L. REV. 667, 721-22 (2007) (“Kennedy’s devotion to states’ rights apparently does not extend to what he considers to be overregulation: while he prefers state regulation to federal regulation, he prefers one level of regulation to two, and the market to regulation. His states’ rights advocacy may actually be part of a larger deregulatory preference.”).

96. *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (“The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.”); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) (stating that the Commerce Clause does not protect “the particular structure or method of operation” of a market).

97. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994).

98. *Id.* at 391 (“In this light, the flow control ordinance is just one more instance of local processing requirements that we have long held invalid.”).

99. *Id.* (“The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”).

100. See generally *Dep’t of Revenue v. Davis*, 128 S. Ct. at 1822-23; Karst, *supra* note 85, at 277-79; Evan Sauer, Case Note, *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 34 OHIO N.U. L. REV. 671 (2008).

101. Marc Lifsher, *Cutting Through Haze of Governor’s Stance on Coal*, L.A. TIMES, Dec. 12, 2005, at C-1, available at <http://articles.latimes.com/2005/dec/12/business/fi-coal12>.

102. Letter from Wyo. Infrastructure Auth. to the Cal. Energy Comm’n (Oct. 5, 2005), available at <http://www.wyia.org/Docs/Comments/CA%20Comments%2010-05-05.pdf> (discussing rule-making of S.B. 1368 standards).

challenge, S.B. 1368's drafters included some findings and evidence to counteract the interstate effects.<sup>103</sup>

#### A. *An Effect, but Discriminatory?*

The first step in applying the dormant Commerce Clause test is to determine whether the state law is facially discriminatory.<sup>104</sup> Judged alone, S.B. 1368 will burden out-of-state, coal-fired power plants more than in-state power plants.<sup>105</sup> At the outset, S.B. 1368 parallels the regulation that the Court struck down in *Washington Apple* due to its out-of-state burden, but permitted as facially non-discriminatory in *Clover Leaf*.<sup>106</sup> An important aspect of this analysis is whether a court would hold that S.B. 1368 applies differently to in-state and out-of-state power or whether it delineates between coal and renewable power. If it is the former, S.B. 1368 will be struck down; if it is the latter, it will move on to the second part of the *Pike* test.

A clear intent to protect in-state residents is required to show facial discrimination when a court applies the *Pike* test.<sup>107</sup> The California legislature and Public Utilities Commission (PUC) included findings, which are likely to be given deference in an extraterritoriality finding, that S.B. 1368's purpose was to regulate the carbon emitted in the process of generating power for California.<sup>108</sup> The support documents will be essential to a ruling that impacts on interstate trade are unintentional and merely a by-product of worthwhile legislation.<sup>109</sup> The Los Angeles Department of Water and Power (DWP) has shown evidence of this non-discriminatory purpose by signing a contract for renewable power from Utah, the very same state whose coal contracts would be limited by S.B. 1368.<sup>110</sup> California is not attempting to isolate

---

103. See S.B.1368, 2005-2006 (Cal. 2006) (providing reasoning behind the law).

104. See *supra* Part I(a).

105. Brian H. Potts, *Regulating Greenhouse Gas 'Leakage': How California Can Evade The Impending Constitutional Attacks*, 43 *ELECTRICITY J.* 19, 46 (2006).

106. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-74 (1981); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352-54 (1977).

107. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978). "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* Rather, if the regulation's goal is to "place added costs," then it is a violation. See *id.*

108. CAL. PUB. UTILITIES COMM'N, *POLICY STATEMENT ON GREENHOUSE GAS PERFORMANCE STANDARDS* (2005), [http://www.cpuc.ca.gov/word\\_pdf/REPORT/50432.pdf](http://www.cpuc.ca.gov/word_pdf/REPORT/50432.pdf) ("[T]o have any meaningful impact . . . GHG emissions reduction goals must be applied to the State's electricity consumption, not just the State's electricity production . . .").

109. See *supra* Part I.

110. CITY OF L.A. DEP'T OF WATER AND POWER, 2007 INTEGRATED RESOURCES PLAN, at D-14 & 15. This is similar to the rationale in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-74 (1981).



itself from a problem<sup>111</sup> or give a benefit to only in-state power producers,<sup>112</sup> so it is considered unlikely that a court would apply a strict scrutiny test.<sup>113</sup> Much like the ruling in *Clover Leaf*, S.B. 1368 is not facially discriminatory because it does not differentiate between out-of-state and in-state power; rather, it draws the line on GHG emissions.<sup>114</sup>

### *B. In the Balancing Test*

Assuming that S.B. 1368 will not be found to be facially discriminatory, a court will then have to weigh the impact on interstate commerce against the value of S.B. 1368 to California.<sup>115</sup> As described in *Pike*, “If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved . . .”<sup>116</sup> The main issues in this application will be whether there are other, better options to regulate GHG, whether GHG reductions are a “local interest,” and whether potential GHG reductions outweigh the burden that the out-of-state coal industry will face.

---

111. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392-94 (1994) (restating that in the waste-disposal cases the Court looked on any state regulation aiming to insulate itself from the interstate market in garbage with a jaundiced eye).

112. See *supra* notes 103, 108 and accompanying text, evidencing a purpose to limit GHG emissions, not affect interstate power trading. While all coal burning plants are out-of-state, only half of California’s out-of-state power sources would be effected by S.B. 1368, evidencing that something besides geography was the determining factor. See NYBERG ET AL., *supra* note 24, at 5. This determination will also rest on facial-discrimination finding and whether or not the Court finds the purpose to be valid.

113. Kysar & Meyler, *supra* note 22, at 1666; Patricia Weisselberg, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions from Out-of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause?*, 42 U.S.F. L. REV. 185, 219 (2007); Peter Carl Nordberg, Comment, *Excuse Me, Sir, But Your Climate’s on Fire: California’s S.B. 1368 and the Dormant Commerce Clause*, 82 NOTRE DAME L. REV. 2067, 2083-84 (2007).

114. Endrud, *supra* note 78, at 271-272; Farber, *supra*, note 36, at 894; Weisselberg, *supra* note 113, at 208-09; Potts, *supra*, note 105, at 4; Nordberg, *supra* note 113, at 2083-84; Yvonne Gross, Note, *Kyoto, Congress, or Bust: The Constitutional Invalidity of State CO<sub>2</sub> Cap-and-Trade Programs*, 28 T. JEFFERSON L. REV. 205, 225 (2005).

115. Some current Supreme Court Justices have rejected this analysis. See *supra* Part I(b).

116. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (stating that the Court will strike down a law if it “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits”).

## *I. Best Available Option*

In determining whether or not S.B. 1368 is the best available option to California, a court would look to whether California is actually pursuing the best path towards its purported goal of lessening the State's GHG emissions.<sup>117</sup> Expecting such a challenge, California legislators included reasoning for the law in its text that they are “protecting the state against financial and reliability risks . . .”<sup>118</sup> and that S.B. 1368 “will reduce potential financial risk to California consumers for future pollution-control costs.”<sup>119</sup> These rationales rely on an understanding that future carbon emission laws will require GHG cuts, which is increasingly likely.<sup>120</sup> Determining whether S.B. 1368 is the best option will require a weighing of the state interest in GHG regulation and a determination of California's intent in passing S.B. 1368.<sup>121</sup> In this case, the legislative history evidences intent to attack global warming, a problem that is currently addressed solely by reducing GHG emissions.

Out-of-state power generators would likely argue that S.B. 1368 puts too large of a burden on utilities by failing to limit the State's transportation sector's GHG inputs. Roughly 30% of California's GHG emissions come from transportation,<sup>122</sup> and any plan that ignores these emissions is opening itself up for a challenge on unfairly targeting one industry. However, because S.B. 1368 was passed along with other state regulations on automobile GHG emissions,<sup>123</sup> it is likely that a court would find that the overall regulatory scheme was to lessen carbon emissions, not punish an out-of-state industry. This follows a recent Supreme Court decision upholding a tax break scheme to benefit in-state bonds in which the statutory package was examined as a whole and not

---

117. See *supra* Part II(a).

118. *California Bill on GHG Standard for Power Purchases Hits Snags*, CLEAN AIR REP. (Wash., D.C.), May 18, 2006, available at 2006 WLNR 8469898.

119. S. 1368, 2005-2006 § 1(i) (Cal. 2006) (also including reasoning that they were protecting against “future reliability problems in electricity supplies,” *id.* § 1(j)).

120. This is due to changes in the federal government and climate-change policy as a whole. Zachary Coile, *Climate Change Remains a Top Priority*, S.F. CHRON., Nov. 30, 2008, at A-6, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/11/30/MNJT14EFD.TL>.

121. Compare with the intention relating the garbage regulation struck down in *City of Phila. v. New Jersey*, 437 U.S. 617, 627-28 (1978). The ban on out-of-state trash in *City of Philadelphia* is by definition different from a CO standard put on all power (both in-state and out-of-state).

122. CALIFORNIA AIR RESOURCES BOARD, CLIMATE CHANGE SCOPING PLAN APPENDICES: VOLUME I: SUPPORTING DOCUMENTS AND MEASURE DETAIL, at F-7 tbl.3 (2008), available at [http://www.arb.ca.gov/cc/scopingplan/document/appendices\\_volume1.pdf](http://www.arb.ca.gov/cc/scopingplan/document/appendices_volume1.pdf).

123. There have been two other bills limiting emissions from cars. Assemb. 32, 2005-2006 (Cal. 2006); S. 1493, 2001-2002 (Cal. 2002).

piecemeal.<sup>124</sup> Furthermore, California allows for alternative methods for coal-fired power plants to meet the new requirements, including allowances for plants to sequester carbon emissions,<sup>125</sup> evidencing a GHG-reduction goal, not an intention to burden out-of-state power. In evaluating these two arguments, it is likely that a court would rule that S.B. 1368 is the best solution to the goal of lessening California's GHG emissions.

## 2. *Legitimate Local Purpose*

In order to pass the *Pike* test, California will have to show a strong local interest in preventing the effects of global warming. Commentators have challenged whether preventing climate change is appropriately categorized as a "local" state interest,<sup>126</sup> and the issue has not been settled in court. *Massachusetts v. EPA* is instructive, as it shed light on the Court's opinion on the climate-change regulations<sup>127</sup> and adjudged a state's interest in preventing climate change as a whole. However, because it did not rule on a state law regulating GHG emissions, any application to S.B. 1368 would require a logical jump.

In *Mass. v. EPA*, the Court ruled that Massachusetts had standing to challenge the EPA's refusal to regulate GHGs because the State faced a threat from climate change "concrete" enough to show harm.<sup>128</sup> The Court found that a state or person could not be denied standing to redress harm simply because the harm is on a large scale.<sup>129</sup> From this ruling, it

---

124. *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1813-14 (2008) (ruling that the Court would not look at Kentucky's conduct solely through the action at hand, but would examine Kentucky's bond-and-tax system as applied to in-state and out-of-state interests in deciding whether the Kentucky tax violated the dormant Commerce Clause or fit into the market participant exception).

125. CAL. PUB. UTIL. CODE § 8341(e)(6) (West 2009) (creating an exception for "permanently disposed" carbon dioxide "in geological formations in compliance with applicable laws and regulations").

126. Gross, *supra* note 114, at 222-229. Gross also makes the case that laws like S.B. 1368 violate the Foreign Affairs Power and the Supremacy Clause. *Id.* at 229-35. However, her article came out before *Massachusetts v. EPA*, 549 U.S. 497 (2007), was decided and before S.B. 1368 was enacted.

127. *Massachusetts v. EPA*, 549 U.S. at 516-25 (discussing standing and causation required for states to force action on global warming).

128. *Id.* at 517. The majority appeared to give extra credence to the standing because the challenger was a state, a theory maligned by Chief Justice Roberts. *Id.* at 548-49 (Roberts, C.J., dissenting).

129. *Id.* at 526 n.24 ("To deny standing to persons who are in fact injured simply because many others are also injured simply because many others are also injured,

is clear that the Court values a state's right to challenge an administrative decision not to regulate GHGs, noting that the relatively limited "local" interests that Massachusetts had in protecting its coastline from sea-level rise were not too small to deny the state an interest in spurring federal action.<sup>130</sup> This would lead to an inference that California's interest in preventing sea-level rise and problems with the state water supply would be given weight by the Court.<sup>131</sup>

This weight, however, has only been proven to show that a state has the right to challenge federal inaction; the Court said nothing about whether this right extended to give a state the right to regulate GHGs on its own, as S.B. 1368 does. The dissent's opinion, that the state failed to meet the redressability requirement because of the limited scope of U.S. GHG reductions,<sup>132</sup> would seem to be more relevant in a case involving the relatively small-scale action of a state. It is unsettled whether this reasoning would draw over any Justices from the majority in *Massachusetts v. EPA*, which could upend the 5-4 decision and invalidate the weight that the Court gave to state interest in preventing climate change.<sup>133</sup>

Beyond the scale issues of a state acting on climate change, there are questions related to the value assigned to local environmental regulations that affect interstate commerce.<sup>134</sup> Commentators, citing *West Lynn Creamery*,<sup>135</sup> have claimed that the purpose of limiting GHGs is not to be given much weight in the *Pike* test.<sup>136</sup> While the value assigned to an environmental regulation is necessarily subjective, in *West Lynn Creamery*, the Court found the state's environmental purpose to be lacking, if not entirely made up.<sup>137</sup> How the Court would rule in the case of a substantive environmental purpose is unclear, but the ruling in *West Lynn Creamery* illustrates only how the Court will rule on a

---

would mean that the most injurious and widespread Government actions could be questioned by nobody.'") (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687-88 (1973)).

130. *Id.* at 521-24 ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop."). Chief Justice Roberts disagreed completely. *Id.* at 544-47 (Roberts, C.J., dissenting).

131. Farber, *supra* note 36, at 897.

132. *Massachusetts v. EPA*, 549 U.S. at 545-46 (Roberts, C.J., dissenting) (writing that the weak causation link leads to an even weaker claim that the state can require national action, as even national action would not necessarily stem the loss of Massachusetts's coastline.).

133. Most important to this analysis are the judges dormant Commerce Clause theories, outlined *supra* in Part I(B).

134. MacDougald, *supra* note 23, at 1441-43.

135. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 204-05 (1994).

136. MacDougald, *supra* note 23, at 1443.

137. *West Lynn Creamery*, 512 U.S. at 205 n.20.

baseless and clearly inadequate environmental purpose and does not extend to a substantive claim with legislative findings.

### 3. *Rationally Related*

As a part of the *Pike* test, the Court must also find that S.B. 1368 is “rationally related” to the goal of preventing the harms of climate change.<sup>138</sup> Most illustrative of this point is *Washington Apple*, where the Court found that additional labeling on apples was not rationally related to food safety; rather, the intention of the law was entirely to benefit in-state apple growers.<sup>139</sup> In an S.B. 1368 challenge, it will be much harder for California to prove the necessity of the regulation if it is seen as an attempt to provide a blueprint for federal legislation or has a purpose other than limiting GHG emissions.<sup>140</sup> Some commentators have actually gone so far to state that California has, knowingly or not, “hit the regulatory sweet spot” for inducing federal action on GHGs, as power generators are potentially facing inconsistent and costly state regulations of their carbon emissions.<sup>141</sup> If a court finds that California’s intention in passing S.B. 1368 was solely to provide a blueprint or create uncertainty, the State’s action will likely be found to be unrelated to the goal of preventing the harms of climate change.<sup>142</sup> If the Court accepts the legislative and agency findings that S.B. 1368 is meant to lessen the effects of climate change in California, ensure electricity reliability, and modernize California’s electric infrastructure at face value, then the rational relationship required by the *Pike* test should be satisfied.

### 4. *Extraterritoriality*

In a potential complaint, it is likely that any S.B. 1368 challenger would emphasize the “extraterritoriality” ruling in *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, which struck down a regulation

---

138. See *supra* Part I(a).

139. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352-54 (1977).

140. Kysar & Meyler, *supra* note 22, at 1669; Chemerinsky et al., *supra* note 74, at 10,659.

141. J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1533-34 (2007).

142. Farber, *supra* note 36, at 897 (citing *Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69, 81 (7th Cir. 1975), cert denied, 421 U.S. 978 (1975) (ruling that providing an example to other communities was an acceptable rationale for the City of Chicago to affect interstate commerce)).

that limited its application to in-state liquor sellers, but effectively regulated prices in nearby states.<sup>143</sup> At issue in the “extraterritorial” test is whether the state “directly controls” commerce “wholly outside the boundaries of a state”<sup>144</sup> The *Brown-Forman* court saw no rationale for the New York law beyond simple economic protection of in-state residents, which evidenced facial discrimination,<sup>145</sup> a situation not present in the analysis of S.B. 1368. When applying this test, a court should take into account that California is not regulating a transaction that takes place *entirely* out-of-state and, in writing S.B. 1368, had intentions more legitimate interests than protecting in-state businesses.<sup>146</sup>

### C. The Market Participant Doctrine

The dormant Commerce Clause has one notable applicable exception: the market participant doctrine. Under this exception, states have full right to pass any rule, standard, requirement or guideline that governs their actions within a marketplace, as long as they are acting solely as market *participants* and not as regulators.<sup>147</sup> The Supreme Court first acknowledged the market participant doctrine in 1976 when it ruled that Maryland could discriminate against out-of-state scrap dealers because the State was creating a market for abandoned cars in buying in-state cars, not just regulating their removal.<sup>148</sup> Regulations limiting sales from a state cement factory to state residents<sup>149</sup> and placing quotas on city residents working on city projects<sup>150</sup> have been upheld when the state was buying and selling in the market. This does not extend to state requirements on “downstream” activities beyond the state’s control as a buyer or seller,<sup>151</sup> or when the state is not pursuing a traditional state participatory role in the market.<sup>152</sup>

A recent Ninth Circuit case supports the proposition that a market participant exception could be used for publicly owned utilities to follow S.B. 1368. In *Engine Manufacturing Ass’n v. South Coast Air Quality*

---

143. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 581-84 (1986).

144. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

145. *Id.* at 336-37; *Brown-Forman*, 476 U.S. at 583.

146. The rationale is discussed *supra* in Part II(a).

147. *See supra* note 31 and accompanying text.

148. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803, 809-10 (1976).

149. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980).

150. *White v. Mass. Council of Const. Employers, Inc.*, 460 U.S. 204, 206-08 (1983).

151. *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).

152. *See Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1809-11 (2008). The line between “downstream” and “traditional” actions lies between the timber-processing requirements on Alaska state forests in *Wunnicke* and the waste-processing guidelines of *United Haulers*.

*Management District (SCAQMD)*,<sup>153</sup> the Ninth Circuit ruled that the Air Quality Management District was acting as a market participant when it required governmental agencies of all levels to stock their vehicle fleets with hybrid and low-emission cars.<sup>154</sup> Although the Court remanded the case for full examination on different grounds, it was a signal that when the state, or any subdivision,<sup>155</sup> is buying or selling in a market, it can include restrictions and qualifiers, regardless of their effect on interstate commerce.<sup>156</sup> Furthermore, it found the Air Quality Management District to be acting as a participant when it regulated the type of vehicles that governmental agencies could purchase, not limiting its reach to its own District purchases.<sup>157</sup>

For utilities enacting standards from S.B. 1368 to gain exemption under the market participant doctrine, the court would have to rule that the utility is a market participant. The regulating authorities (PUC, California Energy Commission [CEC], California Air Resources Board [CARB] amongst others involved in application of California's climate-change laws) are not market participants. Privately owned utilities are also not governmental entities. Publicly owned utilities, however, do qualify as market participants because they are technically government entities and participate in the market as buyers, sellers and generators.

The Los Angeles Department of Water and Power (DWP) and all smaller publicly owned utilities in the State could impose nearly any regulation or standard, no matter whether it is in violation of the dormant Commerce Clause, because DWP's actions within the marketplace are those of a participant, not a regulator.<sup>158</sup> DWP is a department within the City of Los Angeles, which means that it functions more like an agency or an arm of government.<sup>159</sup> This is distinct from California's two other major utilities, San Diego Gas & Electric and Pacific Gas and Electric, which are privately owned and operated. DWP's status as a

---

153. 498 F.3d 1031 (9th Cir. 2007). This case was decided in the Ninth Circuit, has not, as of publishing time, been submitted to the Supreme Court for cert., and has not yet returned to the District Court.

154. *Id.* at 1039-1042.

155. *Big Country Foods, Inc. v. Board of Education of Anchorage*, 952 F.2d 1173, 1179-80 (9th Cir. 1992).

156. *SCAQMD*, 498 F.3d at 1039.

157. *Id.* at 1045-46.

158. *See Farber, supra* note 36, at 896.

159. Los Angeles Department of Water & Power, *Our Service and History*, <http://www.ladwp.com/ladwp/cms/ladwp000508.jsp> (last visited Nov. 11, 2009).

municipal utility gives it the freedom to undertake any contractual obligations its Commissioners and CEO think wise, and for interstate commerce purposes, it is treated as any other business. According to precedent that looks for “direct state participation in the market,” DWP and all smaller public utilities should meet the participation burden as they buy, sell, and own the means to generate power.<sup>160</sup>

Arguments have been made for switching to a system where all utility electricity passes through the State’s control so that California can avail itself of the exception.<sup>161</sup> However, this system seems unlikely as it would give near complete control over the electricity market to the State—a situation that is unpopular amongst consumers, regulators, and utilities alike.<sup>162</sup> Furthermore, while commentators have discussed the possibility of gaining the market participant exception by treating carbon credits as a good,<sup>163</sup> this seems like an untenable solution because the Court has stated that it examines a state’s participation in the market, not just the good’s presence.<sup>164</sup> The current structure of the California electricity market affords the market participant doctrine exception to DWP but does not extend to the other utilities in the State. This is a notable exception, as DWP provides power for nearly 1.5 million homes and businesses and produces over 26 billion kilowatt-hours.<sup>165</sup>

---

160. See *Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1810 (2008) (selling bonds is a traditional state purpose); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803, 809-10 (1976) (buying Maryland scrap cars created a market that the state participated in, so interstate effects were unimportant); Farber, *supra* note 36, at 896. While the regulation is coming from the state, DWP’s exemption is valid. See Treg A. Julander, *State Resident Preference Statutes and the Market Participant Exception to the Dormant Commerce Clause*, 24 WHITTIER L. REV. 541, 579 (2002).

161. Potts, *supra* note 105, at 9-10 (citing A.B. 1X, a law passed during the California energy crisis that gave the state control over utilities, and arguing that this would give the state complete coverage under the market participant doctrine).

162. *Id.* at 10. Also, after the energy crisis of the early 2000s, the state is unlikely to attempt to enter the electricity market in such an active way.

163. Kysar & Meyler, *supra* note 22, at 1658-61. Much like in *Alexandria Scrap*, California’s regulation has the effect of altering the market, but in an acceptable way. As Maryland was “entered into the market to bid up the price,” California has ordered the PUC to bid up the price of renewable power.

164. See *supra* Part II(a). This is also a form model application, but likely to be applied only when making the credits “goods” themselves because of a clear intent to regulate the market, not participate in it.

165. Los Angeles Department of Power and Water, Power System Facts in Brief, <http://www.ladwp.com/ladwp/cms/ladwp001517.jsp>.



#### IV. PREDICTIONS AND POLICY RECOMMENDATIONS FOR CLIMATE LEGISLATION

##### *A. Potential Challenges*

If a case challenging S.B. 1368 is brought to the Supreme Court, a ruling will undoubtedly be split. Testing S.B. 1368 for a dormant Commerce Clause violation includes enough variables to make predicting potential rulings difficult. It can be assumed that such a case will result in two major splits in the Supreme Court: on the dormant Commerce Clause and on the value of public health and environmental regulations. Justices Kennedy and Alito are likely to see S.B. 1368 as invalid, as they have consistently ruled that the dormant Commerce Clause exists primarily to create a free and open market, and that a regulation impacting the movement of an article of interstate commerce is given little weight in the *Pike* test. Equally as likely, Justices Thomas and Scalia will rule in favor of upholding S.B. 1368. While their dissent in *Massachusetts v. EPA* leads one to believe that they would assign little value to a state regulating GHGs to prevent what they called a global problem,<sup>166</sup> this analysis would be preempted because valuation of the law is done in the *Pike* balancing test, something both Justices Thomas and Scalia regard as an improper application of the Constitution. Justice Breyer is also likely to uphold S.B. 1368, as he looks primarily for differential treatment based on geography to invalidate a state regulation.

Predicting the rulings of Justices Roberts, Stevens, and Ginsburg, is imperfect, as all would come to their decisions using different paths. Chief Justice Roberts would likely weigh the desire to allow states to regulate against a climate-change threat he called into question in *Massachusetts v. EPA*,<sup>167</sup> while allowing for state environmental regulations as he did in *United Haulers*.<sup>168</sup> Justices Stevens and Ginsburg would likely weigh the value they assigned state climate-change laws in their standing ruling in *Massachusetts v. EPA* against their desire for national standards in what is clearly a global issue. Though a specific vote prediction is difficult and speculative at best, one can predict that S.B. 1368 would be upheld by the current Supreme Court.

---

166. *Massachusetts v. EPA*, 549 U.S. 497, 549-60 (2007) (Scalia, J., joined by Thomas, J., dissenting).

167. *Id.* at 535-38 (Roberts, C.J., dissenting).

168. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007); *see also supra* note 58 and accompanying text.

### B. Cooperative Federalism

The interplay of state and federal law on climate change is not yet settled, although attendees of the 2009 Energy and Climate Law Journal Symposium at the University of San Diego generally expect that the legislation coming from current discussions will be one of cooperative federalism.<sup>169</sup> Cooperative federalism is the concept that state, federal, and local governments work together, often with federal regulations providing a minimum level of protection, with states given the power to enact stronger standards.<sup>170</sup> The best example in the environmental field is the Clean Air Act,<sup>171</sup> as the federal Environmental Protection Agency sets a national standard but leaves it up to the states to develop the best way to attain such standards. In this way, state plans are adopted as federal law so that localized policy decisions carry the weight and extend a federal law's reach and adaptability. Under this regime, state and local governments can utilize site-specific and particularized knowledge while making the most of the heft and enforcement power of the federal government. The federal government applies a "floor," or minimum standard, while it allows states to enact a "ceiling," or more stringent level of protection.<sup>172</sup>

Under such a system, the economics of a cap-and-trade system become complex because the two caps would theoretically operate in the same sphere. Developing a carbon regulatory system is complex enough, but combining state and regional cap-and-trade systems will lead to complications. In a state with a more stringent carbon emissions regulatory scheme, emission credits utilized under the federal program are pushed out-of-state, much like under the leakage concept, because the credits become unusable in that state, but fully valid under the

---

169. This inference was taken from speeches and conversations held at the Symposium on Feb. 20, 2009.

170. Jonathan Binder & Jared Snyder, *The Changing Climate of Cooperative Federalism: The Dynamic Role of the States in a National Strategy to Combat Climate Change*, 27 UCLA J. ENVT'L. L. & POL'Y 231, 233 (2009).

171. Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 817 (2008).

172. The last failed federal bill, the Lieberman-Warner Climate Security Act of 2007, S. 2191, 110th Cong. (2008), specifically granted states the rights to regulate carbon emissions, but gave them no role in the regulatory structure. The federal cap was still most important, and for all purposes, the overall cap. If this situation is duplicated in upcoming bills, then states that do further limit carbon emissions will see regulated industries and power production moving out-of-state, only to sell the same power back. This is exactly why federal legislation has to allow for states to regulate based upon consumption levels, not just production.

federal cap.<sup>173</sup> This results in state laws simply moving emissions, not actually reducing them, because the important cap is still the federal one, not the state program.<sup>174</sup> Addressing this problem by “sealing off” states as caps unto themselves destroys the entire economic benefit of a national cap-and-trade market by creating fifty separated markets, and is thus a poor solution.<sup>175</sup>

The main thrust of any potential solution should be to allow states to hold themselves to higher standards than federal law but to do so in a way that eliminates emissions rather than simply moving them out-of-state. For example, if California wants to cut the emissions it is responsible for, while paying the higher per kilowatt hour fee or increased taxes, it should be able to do so.

Under any cooperative federalism regulatory model, the only way for California to actually affect lower emissions as a state would be to pass laws that regulate what is *consumed* in-state rather than solely what is *produced* in-state.<sup>176</sup> This becomes clear if California is given direct control over the allotment of carbon emissions in a federal program that correlate with the amount of carbon it is responsible for.<sup>177</sup> If the federal floor is distributed by the federal government, California reductions are sold elsewhere. But if California is allotted its carbon credits under the federal system and has the authority to withhold a number of credits to set up its own set of carbon reductions, then the overall net emissions of GHGs should be lowered. If federal law fails to allow for state laws that address in-state consumption, these early actors will be put at a disadvantage as federal law becomes the floor—not legally, but in the economics of the system. If federal law is going to follow the cooperative federalism model, the only way it can do so under the constraints of a global problem, is to allow states to regulate every joule, watt, and gallon of gas consumed in the state, rather than just those

---

173. This concept is explained and explored in MEGHAN MCGUINNESS & A. DENNY ELLERMAN, *THE EFFECTS AND INTERACTIONS BETWEEN FEDERAL AND STATE CLIMATE POLICIES*, ALI-ABA COURSE OF STUDY 175, 199-200, Dec., 2008.

174. This assumes that the federal program would set a cap and then apportion the permits themselves instead of giving them to the state to apportion or retire as they see fit.

175. See MCGUINNESS & ELLERMAN, *supra* note 173, at 210-11 (explaining that state-by-state caps deny the flexibility for a market-based system to find the cheapest pollution reductions).

176. California consumes much more energy than it produces, which is pretty much true for everything else except food stuffs and entertainment.

177. This is further explored and explained in Kaswan, *supra* note 9, at Part II(B).

produced in-state. And if the goal is to reduce GHG emissions and grant states some level of control in the system, dividing credits for allocation by the states is key to any program's success.<sup>178</sup>

## V. CONCLUSION

Potential future lawsuits brought to strike S.B. 1368 as a violation of the dormant Commerce Clause are likely to fail. The law itself does not treat in-state and out-of-state power differently, drawing dividing lines based on emissions not geography, so S.B. 1368 is likely not facially discriminatory. In the *Pike* test, the “legitimate local purpose” question is less clear, but if *Massachusetts v. EPA* is extended, the State's standing requirements will be met, which will likely lead to a court giving state climate-change regulations great weight. While standing to force federal action does not necessarily equate to a finding of sufficient local interest, the two are logically related enough that a strong argument can be made. Even without *Massachusetts v. EPA* lending itself to a finding of a full, legitimate local interest, it is likely that courts would find S.B. 1368 to be the best available option to California to address the State's legitimate interest in stemming carbon emissions and providing incentives to businesses to do the same.

Simply because S.B. 1368 would likely be upheld, does not make it the best solution. State-level action is an awkward fit for climate-change regulation because states cannot sign agreements with foreign countries and cannot go beyond their borders in their regulations. However, in the absence of federal legislation on an issue of such importance, states have had to fill the void, and the work they have done should not be negated by federal law. The role for California in the federal structure is to be, as Justice Brandeis said, a “laborator[y] of democracy”<sup>179</sup> and provide an example, good or bad, for national action. This role is unlikely to go away, particularly as the common theory on forthcoming federal climate laws is that they will create a cooperative federalism system. Such a system, in allowing the federal government to set the floor and states to set their own ceilings, has the most potential to produce a comprehensive and worthwhile climate policy for the nation, but only if it is done correctly. And only if states are allowed to enforce laws that tend to their consumption, not just production, as S.B. 1368 does.

---

178. See *id.* at Part V for why federal standards should be distributed to the states for state-induced reductions to result in an actual net reductions of GHGs.

179. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).